United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1237

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HARLEM RIVER CONSUMERS COOPERATIVE, INC.,

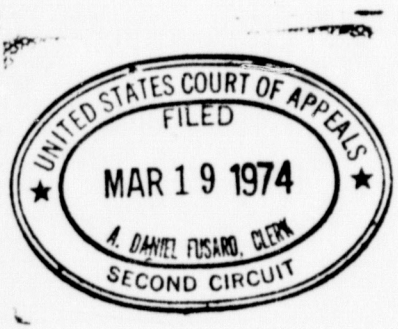
Plaintiff-Appellant

-against-

ASSOCIATED GROCERS OF HARLEM, INC., RETAIL, WHOLESALE & CHAIN STORE FOOD EMPLOYEES UNION, LOCAL 338, ASSOCIATED FOOD STORES, INC., FEDCO FOODS, INC., MID-EASTERN COOPERATIVES, INC., PIONEER FOOD STORES, COOPERATIVE, INC., SHOPWELL, INC., SLOAN'S SUPER-MARKETS, INC., THEODORE SOLOMON, AARON KAUFMAN, and HARRY ROSENBLUM

Defendant-Appellees.

DOCKET NO. 74-1237



BRIEF FOR HARLEM RIVER CONSUMERS COOPERATIVE, INC., PLAINTIFF-APPELLANT

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BRIEF FOR HARLEM RIVER CONSUMERS COOPERATIVE, INC., PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order entered in the United States District Court, Southern District of New York, granted by Hon. Lawrence W. Pierce, on February 7, 1974, as amended on February 15, 1974. The order entered at the end of Plaintiff, Harlem River ("Harlem Co-Op") Consumers Cooperative, Inc.'s direct case, granted motion of Defendant-Appellees, Associated Food ("Associated") Stores, Inc., Fedco

Foods, ("Fedco") Inc., Mid-Eastern ("Mid-East") Cooperatives, Inc., Pioneer Food ("Pioneer") Stores Cooperative, Inc., Shopwell ("Shopwell") Inc., Sloan's ("Sloan's") Inc., Theodore ("Solomon") Solomon, Aaron ("Kaufman") Kaufman, and Harry ("Rosenblum") Rosenblum, to dismiss Plaintiff's application for further interim preliminary injunctive relief pending final trial and determination of this antitrust action.

NATURE OF THE CASE

This private antitrust action is for permanent injunctive relief and treble damages brought under Sections 4 and 16, of the Clayton Act. It was filed on September 23, 1970, in the United States District Court for the Southern District of New York by Harlem Co-Op, a duly organized New York State non-profit consumer cooperative corporation. (Complaint pars. 3-6, 24-27)

At the time of the entry of the order appealled from, Harlem Co-Op consisted of approximately 4,400 family-member shareholders, the major portion of whom are low-income consumer Harlem residents, who have invested $327,000. in it, as an opportunity for quality merchandise at fair prices, employment, training, and to enhance the functioning of the group. (TR. 581-586)

At the time this action was commenced Local 338, had conducted a picket line in front of Plaintiff's consumer cooperative supermarket, located at West 147th Street and Seventh Avenue, New York, New York which has approximately 10,000

square feet of selling area, consistently for seventeen (17) months. Local 338, has collective bargaining agreements with the Competitor-Defendants, Fedco, Sloan's, and Shopwell. Local 338's collective bargaining agreement with AGH covers AGH's member stores and the Associated and Pioneer Stores located in the Harlem area. (order p. 29)

From the interrogatories and oral depositions it is shown, that the major portion of Harlem supermarkets of the size and magnitude of Plaintiff's supermarket are owned, operated and controlled by Appellees, Shopwell, Sloan's, Fedco, Mid-East, and Associated.

ISSUES ON THIS APPEAL

1. Was Harlem Co-op entitled to further interim preliminary injunctive relief, to enable it to purchase critical National Brand products that are available to competitor-Defendants-Appellees, in this multi-party complex antitrust action, which are essential to continue to carry on its business?

2. Was there sufficient evidence to support a finding, that directly or indirectly Defendants-Appellees are interfering with Plaintiff's continuing to have access to the National Brand products, that are the lifeblood of its supermarket business?

3. Would Defendants-Appellees Associated, Mid-East, Pioneer, Fedco, Shopwell, and Sloan's sustain any damage as manufacturer-distributors-retailers of National Brand products by the granting of Appellant's application?

4. Does denial of access to Plaintiff to National Brand products, that are available to Defendants-competitors result in competitive injury to Plaintiff at the customer level and thereby constitute a violation of the antitrust laws?

5. Was the Harlem Co-op's application for further preliminary injunctive relief pending the trial and determination of this antitrust action, improvidently dismissed at the end of Plaintiff's direct case and inconsistent with the Manual for Complex Litigation?

6. Did Plaintiff's showing of the probability of success at the trial of this action on its previous application, together with its proof of irreparable damage, and little or no damage to the Defendants-Appellees, in the presence of other factors, require the granting of further interim preliminary injunctive relief?

7. Did the Court below allow the Defendants-Appellees to interject extraneous issues, that disrupted Plaintiff's presentation of its evidence, which obstructed and impeded the administration of justice in this action, particularly in view of the public interest in its outcome.

STATEMENT OF ESSENTIALS IN THE CASE RELEVANT TO THE ISSUES PRESENTED ON APPEAL

1. THE COMPLAINT

The complaint sets forth three counts of alleged monopolistic restraints of interstate commerce against forty five (45) Defendants, classified in four (4) categories: first - manufacturer distributor-suppliers; second - competitors; third - a stock cor-

poration, a trade association, and a union local, and; fourth - individuals who are officers and directors of the organizations in the third category.

The first count asserted against all Defendants is a claim of a combination and conspiracy, that restrains trade in interstate commerce and encourages monopolization of the retail food industry in Harlem, in violation of Sections 1 and 2 of the Sherman Act, and Sections 2 and 3 of the Clayton Act.

The second count asserts that Defendant-manufacturer-distributors are suppliers of food, non-food and household products essential to attracting and keeping retail food store customers, who do aid and abet the restraint of trade, in favor of the Competitor-Defendants in their attempt to monopolize the retail food industries in the Harlem area, which is a discriminatory practice in favor of the Competitors, through their method of distribution in violation of Sections 1 and 2 of the Sherman antitrust Act and Sections 2 and 3 of the Clayton Act to the economic benefit of the competitors and suppliers, and to the disadvantage of those whom it is determined to deny entry into the retail food industry.

The third count alleges that the combination, understanding, and course of action constitutes a violation of the New York State common law, prohibiting combinations and conspiracies in restraint of trade, under the doctrine of pendant jurisdiction.

2. THE ANSWERS OF DEFENDANT-APPELLEES

(a) AGH, Food Family, Colonial, Kaufman, Solomon, and Rosenblum on October 20, 1970, filed their Answers of general de-

nials and also alleged that nothing in the complaint shows restraint of trade, that they are not a party to the union dispute, and have done nothing to the Plaintiff.

(b) Shopwell, On October 21, 1970, filed its Answer as Daitch-Shopwell, Inc., denies lack of knowledge of the allegations in the complaint in all respects. An order of District Judge Pierce dated December 27, 1973, substituted Shopwell, Inc., the parent corporation in the place and stead of Daitch-Shopwell, Inc., Shopwell, Inc., filed an Answer on March 8, 1974, which denies knowledge sufficient to form a belief as to allegations in the complaint, except admits that Local 338, is an employees trade union in the retail and wholesale food industry, admits persons named were at various times officers or employees of Local 338, admits it is engaged in the retail sales and distribution of food and household products in Harlem, that the defendants named in Schedule B of the complaint are in the business of manufacturing, processing, distributing, and selling food and household items sold in Harlem area is grown, produced, manufactured, and processed outside of Harlem, admits food and household items are sold to retail outlets in Harlem, who, in tern sell to the public, and admits cause of action in third counts purports to be brought under the doctrine of pendant jurisdiction.

(c) Sloan's filed its Answer of November 2, 1970, which denies knowledge or information sufficient to form a belief, as to the allegation in the complaint, except admits

Sloan's Supermarket is a corporation engaged in the business of selling food and household goods at retail in Harlem and elsewhere, and that it is engaged in Harlem retail food and household products sales, and as affirmative defenses, that it purchases all of the items offered for resale from manufacturers and distributors, all transactions incident thereto have taken place wholly within the State of New York, that the complaint fails to state a cause of action, that complaint in no way specifies any acts of violations under the Clayton and Sherman Act against it, and that acts complained of in the complaint are barred by the various applicable Statutes of Limitations.

(d) Local 338 filed its Answer on November 16, 1970, which denies a conspiracy, and claims that there is a labor dispute, necessitating the picket line in front of Plaintiff's supermarket, and also affirmatively states Plaintiff has failed to state a claim against it.

(e) Mid-East filed its Answer on November 20, 1970, which denies every allegation, or knowledge or information sufficient to form a belief as to all of the allegations in the complaint.

(f) Pioneer filed its Answer on January 21, 1971, which denies every allegation in the complaint, or sufficient knowledge or information to form a belief.

(g) Associated on October 15, 1971, filed its Answer, which denied allegations relating directly or indirectly to Associated Foods, denies knowledge or information sufficient to form a belief, as to the truth of the allegations contained in the complaint, admits that Harlem is in Manhattan, and as affirmative defenses that the complaint fails to state a claim against Associated, that relief sought cannot be granted, the Court lacks jurisdiction over the subject matter of the alleged third count in complaint, and that Associated has been misjoined as a party to the Defendant.

(h) Fedco served its Answer, on November 1, 1971, which denies information sufficient to form a belief as to the truth of the allegations except as to Harlem being geographically located in Manhattan, admits it is a New York State organization which distributes food; and as affirmative defenses alleges that the complaint fails to state a claim against it, that the Court lacks jurisdiction over the subject matter set forth in the complaint, and that Associated has been misjoined as a party to the Defendant.

3. APPLICATIONS TO THE DISTRICT COURT FOR RELIEF BETWEEN PLAINTIFF AND DEFENDANT-APPELLEES

(a) Plaintiff on October 8, 1970, moved for preliminary injunction against eight (8) Defendants in categories 3 and 4, and twenty seven (27) Defendants in category 1 of the complaint. District Judge Walter R. Mansfield granted this

application November 12, 1970, as to eight (8) "core" Defendants. At a November 17, 1970 conference the twenty seven (27) Defendant-Manufacturer-Distributor-Suppliers agreed to service Plaintiff without Court direction. Plaintiff's application for additional injunctive relief was therefore held in abeyance.

(b) Fedco in October 1970, moved to dismiss the complaint on the grounds that it is not sufficiently engaged in interstate commerce to fall within the definition of Sections 1 and 2 of the Sherman Act, or Sections 1, 2 and 3 of the Clayton Act, and that the complaint fails to allege or complain of acts referable to its corporate entity engaged in the business of selling food and household goods at retail. District Judge Thomas B. Croake on September 8, 1971, entered an order which denied this application.

(c) Associated in November 1970, made application to dismiss the summons and complaint for lack of proper service. District Judge Croake on December 2, 1970, directed Associated to accept service as a condition to granting motion.

(d) Plaintiff in November 1970 moved to correct and amend the summons to conform to the complaint. On December 2, 1970, District Judge Croake granted application.

(e) Plaintiff's November 1970 motion for a Rule 2(b) judge and designation as a complex action, on opposition by Local 338, Fedco, Shopwell, and Associated was denied by Chief Judge Sugarman on December 21, 1970, without prejudice to its

renewal after six (6) bench vacancies are filled.

(f) Associated on May 15, 1971, moved to dismiss the complaint and for summary judgment on the grounds that it was not engaged in the retail food business. On September 8, 1971, District Judge Thomas B. Croake entered an order which denied this motion.

(g) Plaintiff on November 19, 1971, made application pursuant to Rules 2(b) FRCP, and 16 for a Rule 2(b) single Judge assignment and a pre-trial conference. On opposition of Local 338, Shopwell, Sloan's Pioneer and Associated, this application was denied by Chief Judge Edelstein on December 1, 1971.

(h) On April 10, 1972, District Judge Mahon granted Local 338's motion pursuant to Rule 26(c) FRCP to suppress two photographs taken by Plaintiff during the Discovery Session, and overruled report and recommendations of Magistrate Raby filed April 10, 1972.

(i) In July 1972, under the Court instituted Individual Case System, this action was assigned to District Judge Lawrence W. Pierce for all purposes.

(j) In October 1972, this action was transferred from District Judge Pierce to newly appointed District Judge Robert L. Carter.

(k) On December 26, 1972, District Judge Robert L. Carter entered an order granting Plaintiff's application to

recuse himself, due to his Board of Trustee positions in subsidiaries of Local 338 and Mid-East, i.e., United Housing Foundation, Inc., and the Council for Self-Help, Inc., prior to his appointment to the District Court. Judge Carter returned the action to District Court Judge Pierce.

(l) Mid-East moved in December 1972, to compel Plaintiff to answer certain Interrogatories, and to strike answers already provided by Plaintiff. This application is still pending before District Judge Pierce.

(m) In February, 1973, Mid-East moved pursuant to Rule 65(b) FRCP to enjoin the Plaintiff from interposing as defenses in Mid-East's New York State Supreme action, any matter covered by the complaint in this action. This application denied on March 2, 1973, by District Judge Pierce.

(n) Plaintiff cross-moved in February 1973, for a Rule 16 pre-trial conference. District Judge Pierce on March 2, 1973, denied this application.

(o) On March 13, 1973, Plaintiff moved to compel Colonial and Food Family, to answer the Interrogatories served upon them on March 13, 1972. This application is still pending before District Judge Pierce.

(p) On March 23, 1973, District Judge Pierce, entered an order assigning this action to Magistrate Sol Schreiber for supervision of all Discovery and settlement discussions, and preparation for trial.

(q) On April 4, 1973, an order with respect to pre-trial conferences held on March 27 and April 3, 1973, as to Interrogatories, oral depositions and a June 4, 1973, pre-trial conference was entered by District Judge Pierce.

(r) On September 21, 1973, Local 338 moved for the disqualification and removal of Plaintiff's Counsel. This application was denied on October 24, 1973, by District Judge Pierce.

(s) On October 24, 1973, District Judge Lawrence W. Pierce, entered an order on Plaintiff's application designating categories of Defendants, and appointing Local 338, as Liaison Counsel, and establishing a document depository.

(t) When complaint was filed on September 23, 1970, Kaufman operated Colonial Supermarket, and Rosenblum operated Food Family Supermarkets. Kaufman and Rosenblum at the hearing in November 1973, testified that they filed voluntary bankruptcy petitions in 1973, in the District Bankruptcy Court without notice to Plaintiff. Kaufman's Colonial Supermarket is now a Pioneer Supermarket. Rosenblum's two Supermarkets on August 24, 1973 in the bankruptcy proceeding were transferred to Met Food Corp. (Pl's. Ex. 56-59)

4. SUMMARY OF STATUS OF PRE-TRIAL DISCOVERY AND INSPECTIONS, INTERROGATORIES AND ORAL DEPOSITIONS PROCEEDINGS BETWEEN PLAINTIFF AND DEFENDANT-APPELLEES

(a) On November 24, 1971, Local 338 filed its Notice of Request for production of documents directed to Plaintiff.

(b) On November 24, 1971, Local 338 filed its Notice, to take Oral Deposition of Plaintiff on November 19, 1971 following denial of Plaintiff's application for a Rule 2(b) Judge and Rule 16 pre-trial conference, on December 1, 1971, Plaintiff consented to both proceedings and notified all Defendants to attend and fully participate.

(c) Local 338's Discovery and Inspection on Notice to all Defendants was conducted by it, with its accountants in attendance on January 31, 1972. February 1 and 2, 1972, Local 338 identified and marked 248 items of documents produced by Plaintiff.

(d) In February 1972, Local 338, adjourned its Oral Deposition of Plaintiff without date, and had not pursued it up to the time of the entry of the April 4, 1973 Pre-trial order of District Judge Pierce.

(e) March 21, 1972, Plaintiff filed its Interrogatories directed to Associated, Colonial, Food Family, Fedco, Sloan's, Shopwell, and Pioneer.

(f) On April 14, 1972, Plaintiff filed its Interrogatories directed to Mid-East.

(g) Plaintiff in June 1972, designated Arthur S. Olick, of Kreindler, Relkin, Olick and Goldberg, Esqs., as Trial Counsel.

(h) Trial Counsel on October 6, 1972, noticed the Oral Depositions of Food Family for October 29, 1973; Shopwell

for November 26, 1973; Colonial for December 10, 1973; Fedco for December 10, 1973; Pioneer for December 24, 1973; Sloan's for January 7, 1974; Associated for January 21, 1974; Local 338, for February 4, 1974; Rosenblum for April 1, 1974; Solomon for April 29, 1974; and Kaufman for May 13, 1974.

(i) Associated on May 22, 1972, served its Responses with objections to providing information as to stock ownership, organizational structure, interlocking ownership with any defendant competitors or manufacturers in the food industry, its designees to identified trade organizations, meetings and functions; discussions at such meetings, information concerning its purchasing, marketing and to distribution to food stores, identified as Associated Food Stores, members and non-members, identity of supervisors of its wholesale warehouse operations, collective bargaining agreements, strikes, lockouts, etc., or manner or method as to how wholesale or retail prices are arrived at, advertising agency services and data and agency; information concerning its subsidiaries and to specifically Associated Food Stores Cooperative, Inc., which it stated owns 38% of Associated's stock, the percentage of sales, ordered from Associated by identified and unidentified, member and non-member food stores.

(j) Pioneer and Fedco served Responses with objections to providing information substantially of the same nature as that objected to by Associated.

(k) Mid-East served its Responses, but objected to providing substantially the same information as Associated, or any information with respect to its inter-relationship with Local 338, and its subsidiaries, or interlocking membership organizations, i.e., United Housing Foundation, Inc., Federation of Cooperatives, Inc., and Council for Self-Help, Inc., or the funding it received to establish low-income food cooperatives and buying clubs.

(l) Following entry on the December 27, 1973, order of District Pierce, Shopwell, on February 21, 1974, subsequent to entry of February 7, 1974, order from which this appeal is taken served Responses to replace April 17, 1972, Responses which under its corporate shield, as a subsidiary did not provide any pertinent information. The February 21, 1974, Responses objects to providing substantially the same information as Associated, Fedco, Pioneer and Mid-East.

(m) Sloan's on June 28, 1972, adequately responded. In its Responses to Interrogatory No. 14, it provided information, that Irving Sloan is the President of two (2) Associated stores, that one of its Directors, Joseph Sloan, is an officer of an Associated store, that another of its directors, Robert Katz, from September 1965, to September 1969, was also an office and director of Food City Stores; that Stephen Karsch has been vice-president of Sloan's Inc., and has been from October 1970 to present, Stephen Karsch, is also vice-president and a director of certain Sloan's subsidiary realty corporations

that own the properties on which it operates its supermarkets; that its warehouses in addition to supplying Sloan's stores supplies and various other chain stores and independent stores with fresh fruit and vegetables and is known as Max Sloan's Inc., that all other food and non-food items sold are purchased from manufacturers-distributors, sixteen (16) of whom are defendants in this action; that on June 28, 1972, its manufacturers-distributors included Met Food Corp. In Response to Interrogatory 25(c), Sloan's responded, that all orders for merchandise, other than meat and produce, originate at store level from the store manager or assistant store manager, all billing is done centrally, and essentially all retail prices are set according to customary mark-up percentages, taking into consideration the manufacturers-suppliers suggested retail price and competition; that from 1965 to 1970, Sloan's handled the Met Food Corp., White Rose line of private labelled canned goods; and from 1966 to present (June 28, 1972), it carried the Met Food Corp., White Rose Line of frozen private labelled merchandise. Sloan's responded to Interrogatory No. 5 that it had Local 338 collective bargaining agreements, for its supermarkets, which were negotiated between Max Sloan and Samuel Karsch, and that these agreements included its store managers and assistant store managers.

(n) The Responses to Interrogatories by Pioneer, Daitch, Mid-East, Associated and Fedco indicate they have private

brand labelled items for retail sale under their names; but objected to providing any further information.

(o) Associated served Plaintiff with sets of Interrogatories propounded to it in January 1972, and August 1973. Plaintiff has served its Responses to both sets of Interrogatories.

(p) In May 1972, Pioneer served Plaintiff with a set of Interrogatories. Plaintiff has served its REsponses and SupPlemental Responses.

(q) Sloan's served Plaintiff with a set of Interrogatories in April 1972. Plaintiff has served its Responses and Supplementals.

(r) Mid-East served Plaintiff with a set of Interrogatories in March 1972. Plaintiff has served its Responses. Mid-East's motion to strike certain answers is still pending.

(s) On April 20, 1973, Local 338 served Plaintiff with a set of Interrogatories. On July 30, 1973, Plaintiff served its Responses.

(t) Plaintiff's Responses and Supplemental Responses to all of these Interrogatories, provide all the information available to it at the time of the filings, and identify the Plaintiff's records as well as the public records, which it relies upon. Plaintiff agrees to supplement upon receipt of any additional information, which is made available to it from any source.

(u) Pursuant to the April 4, 1973, pre-trial order of District Judge Pierce, Plaintiff conducted its oral depositions, between May 9 and June 7, 1973, of Local 338, Associated

Fedco, Mid-East, Pioneer, Shopwell, Sloan's Solomon, Kaufman and Rosenblum. None of these depositions are complete since Plaintiff is awaiting the scheduling of rulings on objections as to providing requested information, production of persons or documents identified at same.

(v) Applications for rulings on all objections of all parties to Interrogatories, by direction of Magistrate Schreiber on Januray 24, 1974, are scheduled for oral agrument from March 19, through 22, 1974.

(w) No dates have been scheduled for rulings on objections by Defendants-Appellees to Plaintiff's oral depositions.

5. STATEMENT ON HOW THE PERTINENT FACTUAL ISSUES IN ORDER APPEALED FROM WERE DECIDED BY THE DISTRICT COURT

A. Plaintiff's October 26, 1973, Application:

1. Harlem Co-op averred and attached documents as to the necessity for the interim injunctive it sought, pursuant to Rules 65 FRCP and the Manual for Complex Litigation, providing that pending the final trial and determination of this action:

(a) that the Manufacturer-Distributors of stated National Brand products, be enjoined from:

(i) failing or refusing to fill its orders to purchase these products in the ordinary course of its business, so as to enable Plaintiff to continue to make them available to its customers;*

* Plaintiff relies upon par. 1 (D) and (E) in the November 25 1970 preliminary injunction order of District Judge Mansfield, directed to Local 338, AGH, Kaufman, Solomon and Rosenblum, which states:

(ii) failing or refusing to sell and deliver these products upon the same terms and conditions as sold to Plaintiff's competitors of similar size and magnitude;

(iii) directly or indirectly continuing to carry out maintain, or renew, the combination of conspiracy discrimination and concert of action alleged in the complaint;

(b) enjoining the Defendants, and all persons in active concert and participation with them, pending the trial and determination of this antitrust action from:

(i) using their trade association or union connections or ties from threatening various suppliers, food brokers, manufacturers, service concerns, who do, or seek to do business with Plaintiff, with threats of economic reprisals, due to their combined, economic strength, exclusive dealing agreements, or other influences;

(ii) continuing to carry out maintain, or renew, the combination, conspiracy and concert of action, alleged in the complaint;

(iii) using their trade association connections or ties, political ties and combined economic strength, to harrass Plaintiff through discriminatory enforcement of Police Department Rules and Regulations, and other City, State and Regulatory laws and statutes, and for such other and further relief as the Court may deem just and proper.

2. As to other Appellees, on October 30, 1973, pursuant to order of the District Court, Plaintiff designated them as Defendants which it sought the following specific relief:

(a) as wholesalers of manufacturer-distributors of the designated National Brand products, Associated Food, Pioneer,

---

(D) "from engaging in conduct" directly or indirectly which would prevent plaintiff from carrying on its business, including the purchase by and delivery to plaintiff of food products and equipment, the sale of its food products, the hiring of personnel and the servicing of equipment.

(E) from threatening or otherwise interfering with directly or indirectly manufacturers, vendors, suppliers, service concerns and customers of plaintiff, and anyone else who does or seeks to do business with plaintiff."

Mid-Eastern, Sloan's, Shopwell, Inc. and Fedco be enjoined from interfering with Plaintiff's right to have access to said products in violation of antitrust statutes;

(b) Use of trade association or union connections or ties from threatening various suppliers, food brokers, manufacturers service concerns, who do, or seek to do business with Plaintiff, with threats of economic reprisals due to their combined economic strength, exclusive dealing agreements, or other influences.

(c) Directly or indirectly using their trade association connections or ties, political ties, and combined economic strength, to have Plaintiff harrassed through discriminatory enforcement of the Police Department Rules and Regulations, and other City, State and Federal regulatory laws and statutes.

3. On October 31, 1973, the order of District Court Judge Pierce in substance stated:

> "The Court's focus, during these hearings will be on whether or not there is, in fact, a change from the status quo achieved by the injunctive order of November 17, 1970, and if so, whether or not the proof indicates consistent with the standards for preliminary injunctive relief, that any of the Defendants named are responsible for the change, in contravention of the antitrust laws."

B. Facts Proven As Stated In The Order Appealed From On The Essential Issues Presented On This Appeal:

For the purposes of this Appeal Appellant accepts these facts as set forth in the findings of facts of the Court below:

> "...The injuction was granted against the "core" defendants...The motion was held in abeyance as against the "manufacturer/suppliers" upon their assurance...they would service Plaintiff.* The "competitor" defendants were not moved against or involved in those proceedings for the...injuction.
>
> The Co-op's business, freed from restraint, soared. By August of 1972, it had reached a weekly gross of around $47,000.00, considerably above its early projections. Meantime, the injunction was upheld by the Court of Appeals in the fall of 1971, and, the pre-trial preparation of this action began in earnest in the late winter of 1973. (p. 7-8)

* All footnotes in District Judge Pierce's order of February 7, 1974 are omitted.

* * * *

...The theory which brought the nine Defendants into the picture was that certain of the previously enjoined Defendants (Local 338, and Harry Rosenblum, Aaron Kaufman and Theodore Solomon, all past or present officers of AGH had combined with "competitor" defendants Associated Food Stores, Inc. (Associated), Fedco Food Stores, Inc. (Fedco), Mid-Eastern Co-operative (MidEast), Shopwell, Inc. (Shopwell), and Sloan's Supermarkets, Inc. (Sloan's), and that these two groups had forged non-Defendant Met into a new tool to put Plaintiff out-of-business. The means alleged was discriminatory patterns of distribution of National Brand products. (p. 9-10)

* * * *

...And finally, the Court was mindful of the admonition of the Supreme Court that:

> (T)he purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. (p. 11)

* * * *

A party seeking a preliminary injunction assumes the burden of demonstrating either a combination of probable success on the merits and the possibility of irreparable injury or that it has raised serious questions going to the merits and the balance of hardships tips sharply in its favor. Stark v. New York Stock Exchange, Inc., 466 F2d 743, 744 (2d Cir. 1972) citing Checker Motors Corp. v. Chrysler Corp. 405 F2d 319, 323 (2d Cir.), cert. denied, 394 U.S. 999 (1969). (p. 12)

* * * *

"As a general proposition, the antitrust laws exist "to protect competition, not competitors." Checker Motor Corp. v. Chrysler Corp., 283 F.Supp. 876, 885 (S.D.N.Y.1968) aff'd 405 F2d 319 (2d Cir.) cert. denied, 394 U.S. 999 (1969). See e.g. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-21 (1940). (p. 14)

* * * *

...require at the threshold, proof that Plaintiff is in competition with other supermarkets which have

received favorable treatment, on reasonably contemporaneous sales, of goods of like grade and quality, from the same supplier. See Centex-Winston v. Edward Hines Lumber Co., supra, FTC v. Borden Co., 383 U.S. 637 (1966). (p. 16)

* * * *

"...Thus, testimony of plaintiff's expert witnesses, and testimony elicited from defendants officers who were called to the stand by Plaintiff, demonstrated beyond question that an adequate supply of national brand products is the lifeblood of a supermarket the size of the Co-op. If such products are out-of-stock with any regularity, even loyal, involved customers eventually turn elsewhere. Further, the testimony of these witnesses plus that of the plaintiff's President, its Store Coordinator, and its Treasurer, demonstrated that carefully timed ordering a carefully determined quantity of supplies is essential to the cash flow, and thus, to the successful operation of a high-volume, fast-turnover food retail business. A necessary corallary is that the goods ordered must be delivered, in full and when expected. If the delivery is incomplete or late, in addition to the damage to customer relations, the supermarket's work schedule is disrupted and the cash flow diminished.

"Plaintiff also proved to this Court's satisfaction that during the relevant period Met Food's weekly deliveries to the Co-op entirely omitted a portion of the items ordered for that week, and failed to include other items in the amounts ordered.

"The procedure by which Plaintiff placed its orders with Met Food was not disputed and is a common one in the industry.

* * * *

It is not contested that the total of these two lists, the delivery invoice and the "scratch list" (in the parlance of the trade) represents the order called in by the customer. Sets of these documents are the most reliable evidence of Met's dealings with Plaintiff. The delivery of October 16, 1973, which was the event which apparently propelled this motion from the talking to the action stage will serve as an example of the evidence underlying the Court's conclusion that Plaintiff's orders were not filled completely and that national brand products were prominent among the items "scratched".

"Adding together the items on the delivery invoice for that week (Local 338, Exh. L) and the "scratch" list of that week (Pl. Exh. 68-C), it appears that Plaintiff ordered a total of approximately 1279 cases (representing some 903 items, counting several sizes of the same product). About 1032 cases were delivered (representing about 733 items), leaving about 19% of Plaintiff's case order "scratched". Of the items scratched or rationed, about 30 have been identified during the hearing as items "critical" to Plaintiff's business...

* * * *

...they do present an overall pattern which this Court does not doubt has caused damage to Plaintiff's business.

* * * *

...Plaintiff must also show that it is being harmed while its competitors served by the same supplier, are being favored in violation of the antitrust laws. (p. 15-19)

* * * *

"This Court is cognizant of the difficulty faced by a litigant attempting to prove that others have conspired to restrict or to destroy its business. Such arrangements, as the Supreme Court has said, "are seldom capable of proof by direct testimony", and may be inferred from the things actually done..." Eastern States Retail Lumber Dealers' Assoc. v. United States 234 U.S. 600, 612 (1914). Thus circumstantial evidence is entirely proper and often necessary in antitrust cases. It is not necessary that simultaneous actions or written agreements be proved. See, e.g. Interstate Circuit Inc. v. United States, 306 U.S. 208, 277 (1939). The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in words. American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946).

"This evidentiary principle applies with particular force where, as here, the Plaintiff seeks not final judgment, but preliminary relief, and where, as here, Plaintiff is a small, independent company with limited resources and the Defendants are larger, well-established companies, some with complex corporate infrastructures. Also, it is pertinent that this proceeding is not being written on an entirely clean state. A judge of this Court has already found evidence sufficient to preliminarily

restrain some of the "core" defendants from conspiring to interfere with Plaintiff's business. Of course, the means alleged in the prior proceeding, and the principals held responsible there are different from the means and, to some extent, the principals here. (p. 25-26).

* * * *

"At the subsequent hearing, Plaintiff offered fragments of testimony, exhibits and prior depositions, each generally aimed at some portion of plaintiff's allegations. ...For instance, evidence has been adduced that defendant Theodore Solomon, Executive Director of AGH 'knows" Harry Lefkowitz who is presently employed by Met Food and who was President of AGH "prior to closing his Harlem store about the same time Plaintiff opened its business in 1968." Other evidence indicates that prior to 1970, Met Food was the supplier for defendant Sloan's Supermarkets, Inc. until Sloan's switched its account to another supplier... Plaintiff has shown that a Green & White Supermarket in Harlem which is supplied by defendant Associated Food Stores, Inc. (a voluntary wholesaler like Met), is run by Joseph Sloan and Irving Sloan, who are brothers of Max Sloan, President of defendant Sloan's. Further, it appears that Max Sloan's daughter is married to Stephen Karsch, employed by (Vice President of) defendant Sloan's who is the son of Sam Karsch, President of defendant Local 338. There is also evidence that defendant Sloan's once owned stock in a food wholesale business, Twin County Grocers, Inc., and that Irving Sloan was associated with one of defendant Pioneer Food Stores affiliates a few years ago. Evidence has been adduced that defendant Mid-East and defendant Pioneer have warehouses down the street from each other in New Jersey, and that defendant Solomon encouraged defendant Rosenblum to buy one Harry Taxon's (Taxin's) share of CCS just prior to the 1969 strike and that Harry Taxon (Taxin) was once connected with defendant Shopwell, Inc.

It is also clear that most of the defendants belong to either or both the New York State Food Merchants Association and the Food Trade Alliance; and that officers of several of the defendants have served at one time or another as officers of those trade organizations. Further, it has been demonstrated that most of the retail stores in the Harlem target area serviced by Met Food are members

of Defendant Solomon's AGH, and that most of the retail operations involved in this hearing negotiate with the same union, defendant Local 338.

It is not entirely impossible that this colloidal mass could be formed into an evidentiary foundation for interfering participation in a surreptitious agreement... (p. 28-29)

* * * *

Plaintiff has shown that national brand products are critical to its business. It has shown that its major supplier of these products has failed to deliver all that it has ordered during the period relevant to this motion for preliminary relief. It has shown that the "scratches" of such products has caused a crisis for the hard-pressed Co-op....(p. 30)

THE RELATIONSHIP OF THE DEFENDANT-APPELLEES INVOLVED IN THIS APPEAL

Plaintiff does not believe that an issue on this appeal is the disputed evidence as to the interrelationships of the Defendants-Appellees. Nevertheless, to avoid clouding the issues by conflicting contentions, it will assume, argundo, that the conclusions of fact drawn by the Court p.25-26 and 28-29 of its order are correct with one exception. Stephen Karsch is not an employee or Sloan's as found by the Court in its order of February 7, 1974 as amended February 15, 1974. Stephen Karsch is Vice President of Sloan's, and also holds executive positions in many of Sloan's realty subsidiaries, that own the real property where some of its supermarkets are situated.

POINT I

AT THE PRESENT STATUS OF THE COMPLEX ANTITRUST ACTION, IT WAS CLEARLY ERRONEOUS FOR THE COURT TO DENY PLAINTIFF FURTHER INJUNCTIVE RELIEF IN ACCORDANCE WITH ITS GENERAL EQUITY POWERS, RULE 65 OF THE FRCP AND THE MANUAL FOR COMPLEX LITIGATION.

The said rule of law understandably is in keeping with Rule 52(a) of the Federal Rules of Civil Procedure. As a result, a reversal of the trial court's findings will follow only if they are found to be "clearly erroneous". The U.S. v. Gypsum Co., 333 U.S. 364, the hearing denied 333 U.S. 869 ,1948).

In Gypsum, the Court setforth the definition of "clearly erroneous" which is still utilized today in the application of 52(a) FRCP. Fuchstadt v. U.S. 434 F.2d 367 (2nd Cir., 1970).

The Court felt that a finding of fact was "clearly erroneous", "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U.S. at 395. Despite the limited opportunity for review and reversal of trial court findings of fact afforded by the Court's definition, the Court still saw fit to reverse the trial court's findings of fact. This occurred because the trial court gave weight to a witness' testimony of denial and very little, if any, to conflicting documentary evidence. The Court said:

> "Where such testimony (oral denials) is a conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involved mixed questions of law and fact". 333 U.S. at 396

An example of same in the case at Bar is that the Court gave great weight to oral statements, of a witness Robert J. Collins, on cross-examination, which defied the written documents (Local 338's Ex. OO), which the illicit testimony was based. In addition, that witnesses testimony on re-direct (Tr. 2659-2661).

The trial court obviously at p. 24-25 relied upon that testimony as the basis for holding that the "hostile forces of nature" were responsible for Plaintiff's lack of the critical product of Carolina rice.

In so doing the trial court completely overlooked Mr. Collins' testimony as to its direct supplying competitors Associated, Daitch-Shopwell, Sloan's, Mid-East and Pioneer. In addition the Court failed to take into account the expert witness, Robert Blythe's testimony as to wholesale industry practice of favoring customers, if it so desired.

Moreover, the court "(a)s fact finder, is required to select from the record those logical inferences, which accord with common sense and experience, and which fall within the normal range of probability in the context of the totality of the evidence". Universe Tanker Ships, Inc. v. Pyrate Tank Cleaner, Inc. 152 F Supp. 903, 920 (S.D.N.Y. 1967); Blood v. New York City, 237 F 2d 855 (2nd Cir. 1957).

Appellant consistently contended that the Met Food Co-Op member stores were not its competitor. The Plaintiff offered evidence through John Brady, an architect, and Pl's Ex. 130-131 O to demonstrate this point. Nevertheless the Court below held that these small Met Co-Op member stores were Plaintiff's competitors. That factual holding totally distorts the principles of antitrust laws applicable to discrimination in distribution between competitors. Appallant has setforth p. 20-25, the factual findings of the Court below, that are consistent with reversal of this order on review.

POINT II

THE COURT'S FINDINGS OF FACT EVIDENCES THAT APPELLANT HAS PROVEN COMPETITIVE INJURY AT THE BUYER'S LEVEL, AND THEREFORE IS ENTITLED TO INJUNCTIVE RELIEF IN THE PENDING ANTITRUST ACTION AGAINST THEM.

The Court below was presented with documented proof (Pl's Ex. 130), and expert testimony that Appellant was a large high volume supermarket, and it so found. (p. 7) The Competitor Defendant-Appellees are large supermarkets of similar size and are competing for the same customers. For the purposes of the antitrust laws applicable the retail customer of a direct purchasing wholesaler is to be treated as the customer of the manufacturer. It is the competitions between the retailer (Harlem Co-Op) and the favored retailers (Shopwell, Sloan's, Pioneer, etc.) which

constitute a violation of the Federal Trade Commission Act Sec. 5(a)(1), and the Sherman Antitrust Act 1 and 2.

Simply stated, whenever a favored retailer (Shopwell, Sloan's, Pioneer, Fedco, etc.) receives a preference over Harlem Co-Op by virtue of their relationship with the overall Shopwell, Sloan's, Pioneer, and Associated structures, and Harlem Co-Op does not, there is a direct violation of the Robinson-Patman Act.

If a supplier-seller can control the terms upon which a buyer once removed may purchase the seller's product from the seller's immediate buyer, the buyer once removed is for all practical purposes dealing with the seller. Purolator Products, Inc. v. FTC, 352 F.2d 874. If the seller controls the sale, he is responsible for the discrimination. Suppliers selling to direct buyers, such as Shopwell and Sloan's must supply equal price reductions, i.e. advertising allowances to other retailers, who are competitors of Shopwell, Sloan's, Associated, Fedco, and Mid-East stores.

Large food chains cannot retreat by saying that they are not in competition with independent retailers on the buying level. The Court will look behind the distribution system and put them on the same level. FTC v. Sun Oil, 83 S Ct. 360.

The primary objective of the Robinson-Patman Act was to aid the independent merchant, who was at the mercy of large, more powerful concerns. Clairol, Inc. v. FTC, 410 F.2d 647 (1968) The Act itself is directed at exterminating such

such advantages unless they are provided on a equal basis to all competing retailers. Fred Meyer v. FTC, 88 S Ct. 904.

The testimony of Harold Tarr (Tr.1762-1763) is evidence of how advertising allowances and rebates, for purchases of Pioneer stores are paid by certain nationally manufactured products to Pioneer Food Stores, Inc.

In the food industry, where food chains often act as their own wholesaler with member stores getting food from this source. Competing retailers may also purchase from the same supplier, but certainly without the same leverage.

The purpose behind disallowing such inequitable distribution of discounts to large buyers is to even out the competition. United Biscuit of America v. FTC, 350 F.2d 615. When it is considered, that large food store chains are able to extract these discounts on a number of articles, the effect on competition become enormous, and substantial injury occurs.

The Court in the order appealled from on p. 16 properly set forth Centex-Winston v. Edward Hines Lumber Co., 447 F.2d 585 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972), as the law. The Court erred in its conclusion that Plaintiff was a competitor of the small Met Food cooperative member stores.

In United Fruit Co. 3 Trade Reg. Rep. par. 20,209 (FTC 1973) the Federal Trade Commission held that a discriminatory direct delivery service was a Section 2(a) price

discrimination. The end result of the discriminatory distribution of the critical National Brand products to favored retailers i.e. Shopwell, Sloan's, Mid-East, Fedco, and Associated, who compete with Harlem Co-Op for the same customers is discriminatory and does cause competitive injury.

Appellant's entire application was addressed to this discriminatory marketing distribution of the critical supermarket National Brand products. It contends that the increasing pressure of the trial of this action on the merits, and the revelation of these facts in the Responses to Interrogatories and Oral Depositions, that was the catalytic agent.

POINT III

WAS THERE SUFFICIENT EVIDENCE BEFORE THE COURT TO SUPPORT AN INFERENCE OF AN UNLAWFUL CONSPIRACY BETWEEN THE DEFENDANT-APPELLEES, PARTICULARLY IN VIEW OF THE PRESENT STATUS OF PRE-TRIAL?

The District Court at pages 28 and 29 found that Appellant had offered "fragments of testimony, exhibits and prior depositions", aimed at the allegation, that it could infer an unlawful conspiracy. However, the Court went on to rely on the case law in Ace Beer Distributors, Inc. v. Kohn, Inc. 318 F.2d 283 (6th Cir.); cert. denied, 375 U.S. 922 (1963), which is clearly distinguishable, because Met Food Corp. is not a manufacturer. At p. 286-7 it is stated:

"A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself... A refusal to deal becomes illegal under the Act only when it produces an unreasonable restrant of trade, such as price fixing, elimination of competition or the creation of a monopoly... The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon a buyer's business does not make the refusal to deal a violation of the Sherman Act."

Again the Court below completely lost sight of the fact that it is the refusal to deal with Appellant, as a competitor of Shopwell, Sloan's, Mid-East, Pioneer, Associated and Fedco, that constitutes the illegality.

The catalytic agent is present, particularly in view of this Court's decision in 450 F.2d 271 (2d Cir. 1971), and the interrelationship of Mid-East and Local 338. It does present other factors, and indeed requires more than a cursory glance, as evidenced by Oral Depositions of both of these Defendants.

The Supreme Court in rejecting the District Court's basis for denying a conspiracy in Norwalk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969) 89 S Ct. 1391 at 1393

"... It is settled that no formal agreement is necessary to constitute an unlawful conspiracy... and that business behavior is admissable circumstantial evidence from which the fact finder may infer agreement..."

In American Tobacco Co. v. U.S., 328 U.S. 781, 809-10 (1946) it is stated:

"It is not important whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. But, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy, which the statute forbids they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy."

The Court endeavored to give great weight to a point of lack of probability of success as to a wholly different and new conspiracy. It even goes so far as to state:

"But, supposition and hope and a past court victory, based on a wholly different set of facts, are not evidence."(p.31) The Court totally fails to take into account or analyze the important factor of the delay or withholding of evidence tactic so prominent is complex antitrust cases. For instance, the vitally pertinent evidence in the Oral Deposition of Mid-East of its participation in Local 338's Business Agent Linwood Joseph Overton obtaining a signature of the purported collective bargaining agreement, that resulted in the illegal picket line.

Appellant had achieved status quo following the Judge Mansfield preliminary injunction. (p.7). The shift is services of the non-defendant supplier Met Food Corp. does defy business logic. The docket will show that the speedy determination of this action has been delayed by a course of conduct of certain defendants.

This Court in Dino DeLaurentiis Cinematografia, S.p.A v. D-150, Inc., 366 F.2d 373 (2d Cir. 1966), in reversing the District Court, stated at p. 375:

> "However, the weight to be given the probability of success is not precisely the same where other factors differ. While the party seeking a preliminary injunction has a burden of convincing with a reasonable certainty that it must succed at final hearing, where it appears that a lack of showing of irreparable damage also exists, the burden is less where the balance of hardship tips decidely toward the party requesting the temporary relief. The likelihood of success is 'merely one strong factor to be weighed along with the comparative injuries of the parties.' Union Management Corp. v. Koppers Company, Inc., 366 F.2d 199 (2d Cir. 1966)

What harm will the Defendant-Appellees suffer if Appellant's application is granted? The lower Court's order is silent as to this essential issue. Plaintiff cannot conceive of any legal one.

CONCLUSION

THE DISMISSAL OF THE PLAINTIFF'S APPLICATION FOR FURTHER INTERIM INJUNCTIVE RELIEF AT THE END OF PLAINTIFF'S DIRECT CASE WAS IMPROVIDENTLY GRANTED

Appellant has raised questions going to the merits so serious, substantial, difficult and doubtful, and the balance of hardships tip decidedly in its favor, that the interim injunctive relief should be granted.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

VENUS HARRIS, being duly sworn, desposes and says, that Deponent is not a party to the action, is over 18 years of age. That on the 19th day of March, 1974, Deponent served the within Brief of Plaintiff-Appellant upon JOSEPH ZUCKERMAN, ESQ., STANLEY BIERMAN, ESQ., ROBERTO LEBRON, ESQ., BERNARD J. FERGUSON, ESQ., SANFORD GOLDBER, ESQ., HOWARD WEINREICH, ESQ., ROBERT SUGARMAN, ESQ., AND SOL NEEDLE, ESQ., the attorneys for defendants in this action, at 575 Madison Avenue, N.Y.C, 275 Madison Avenue, N.Y.C., 349 East 149th Street, Bronx, N.Y., 60-10 Roosevelt Avenue, Woodside, New York, 80 Pine Street, N.Y.C., 377 Broadway, N.Y.C. and 401 Broadway, N.Y.C. the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post office within the State of New York.

Venus Harris
VENUS HARRIS

SWORN TO BEFORE ME THIS
19 DAY OF MARCH, 1974.

Henry Freeman
NOTARY PUBLIC

HENRY T. FREEMAN
Notary Public, State of New York
No. 31-6396950
Qualified in New York County
Commission Expires March 30, 1976